

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**HOLDEN AT KITWE**  
**(Civil Jurisdiction)**

**2010/HK/50**

**IN THE MATTER OF:                   ORDER 30 RULE 14 OF THE HIGH COURT**  
**ACT CAP 27 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF:                   PROPERTY KNOWN AS HOUSE NUMBER 12**  
**BUTEKO AVENUE KALULUSHI AS SECURITY**  
**IN THE AGREEMENT**

**BETWEEN:**

**VLAHAKIS MARCELLAS**

**APPLICANT**

**AND**

**SCHOLASTICA MULENGA KAMUCHELE (As**  
**administrator of the estate of the late LUCAS KAPAYA**  
**KAMUCHELE)**

**RESPONDENT**

**STANBIC BANK ZAMBIA LTD**  
**CLAIMANT**  
**EVARISTO KABILA**

**1<sup>ST</sup>**

**2<sup>ND</sup> CLAIMANT**

Before the Honourable Madam Justice C.K. Makungu

For the Applicant : Mr. F. Chalenga of Freddie & Co.

For the Respondent: Mr. S.A.G. Twumasi of Kitwe Chambers

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**R U L I N G**

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**Cases referred to:**

- 1. Zambia Seed Company Ltd v Chartered International (PTY) Ltd (1999) ZR 151*
- 2. Sonny Mulenga, Vismar Mulenga, Chainama Hotels Ltd v Invest Trust Bank (1999) Z.R. page 101*
- 3. Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) ZR 172 and 176*

**Legislation referred to:**

1. *High Court Act Cap. 27 of the Laws of Zambia - Order 43 Rules 1(b) 2-9*
2. *Lands and Deeds Registry Act Cap. 185 of the Laws of Zambia Section 6*

**Books referred to:**

1. *Chitty on Contracts Vol. 1 General Principles, thirteenth edition, Sweet and Maxwell 2008, General Editor H.G. Beale - para 16-017*

This is an appeal against the Ruling of the Deputy Director of Court Operations (Deputy Registrar) made on 21<sup>st</sup> February, 2012. He was dealing with an interpleader summons made on 19<sup>th</sup> May, 2011 by the Sheriff of Zambia pursuant to Order 43 of the High Court Rules. House No. 12 Buteko Avenue Kalulushi was seized in execution of a Consent Judgment. The main part of the Ruling reads as follows:

***“It was wrong to disposes claimants in particular, the first claimant of his entitlement to the said property to which he is undoubtedly the beneficial owner. The Consent Judgment obtained herein cannot override the proprietary rights of Mr. Kabila, neither can it nullify the sale lawfully executed between Mr. Kabila and Mr. Kamuchele. Therefore the Writ of Possession issued against the subject property is set aside for impropriety. Above all, no Writ of Possession can be issued against an innocent third party having lawful title to the property. The applicant’s alternative is to explore viable and non-futile modes of enforcing the money judgment against the estate of the deceased. The property however is forthwith restored to the***

***rightful owner Mr. Kabila, subject to the mortgage. Costs to be borne by the applicant, to be taxed in default of agreement.”***

The back ground to the Deputy Director’s Ruling is as follows; On 10<sup>th</sup> February, 2010, the applicant issued Originating Summons against the respondent now deceased, for foreclosure and recovery of a mortgage debt in the sum of K351,700,000.00 pursuant to Order 30 rule 14 of the High Court Rules Cap. 27 of the Laws of Zambia. The applicant stated his claims as follows:

1. Foreclosure.
2. Possession of House No. 12 Buteko Avenue Kalulushi.
3. An order for sale of the said house.
4. Interest.
5. Costs.
6. Any other relief the court may deem fit.

On 29<sup>th</sup> April, 2010 the applicant and respondent executed a Consent Judgment which I signed on 3<sup>rd</sup> May, 2010. The Consent Order is to the effect that:

1. The applicant is entitled to an order of foreclosure, possession and sale of house No. 12 Buteko Avenue, Kalulushi.
2. The amount owing is K351,700,000.00.
3. The respondent will pay K351,700,000 in monthly instalments of K70,000,000.00 with effect from 30<sup>th</sup> June, 2010.
4. In default, a Writ of Possession to issue so that the said house can be sold to recover the whole amount due with interest and costs.
5. Any other relief the court may deem fit.

On 5<sup>th</sup> August 2010, the applicant filed a Certificate of Default and applied for leave to issue a Writ of Possession. Leave was granted by myself on 26<sup>th</sup> August, 2010. A Writ of Possession was issued and executed on 24<sup>th</sup> September, 2010 and vacant possession was given to the applicant by the undersheriff. On 21<sup>st</sup> October, 2010 the applicant filed an Application For Leave To Issue Contempt Proceedings which I the undersigned granted on 22<sup>nd</sup> October, 2010. The reasons for the contempt proceedings disclosed in an Affidavit sworn by the applicant in support of the application for leave were that; the respondent had broken into the house and re-entered just a short while after the respondent had taken possession and locked it. The Notice of Motion for contempt of court was returnable on 12<sup>th</sup> July, 2011 but the respondent died on 6<sup>th</sup> March, 2011.

On 21<sup>st</sup> April, 2011 the respondent filed a fresh application for leave to issue a Writ of Possession. An Exparte Order for leave to re-issue Writ of possession was signed by the Deputy Director of Court Operations on 9<sup>th</sup> May, 2011 and a Writ of possession was issued on 13<sup>th</sup> May, 2011 and executed. By then, the 2<sup>nd</sup> claimant had purportedly bought the house from the respondent and taken possession thereof, so he was evicted.

Thereafter, the 2<sup>nd</sup> defendant obtained a stay of execution pending determination of Interpleader Summons by the Deputy Director. There are two Affidavits in support of the claims, both sworn by Kabila the 1<sup>st</sup> claimant. One is dated 13<sup>th</sup> May, 2011 and the other is dated 16<sup>th</sup> September, 2011. The gist of both affidavits is that Kabila is the registered owner of the property in issue. He says the respondent offered it to him for sale on 7<sup>th</sup> May, 2010 at the price of K290,000,000.00 and the offer is exhibited and marked EK1. He accepted the offer and obtained a loan from Stanbic Bank Zambia Ltd the 2<sup>nd</sup> claimant to purchase that house. Later, a Contract of Sale was executed between him and the deceased, consent to assign was obtained and property transfer tax paid. A Mortgage Deed was also prepared

by Messrs ECB legal practitioners who had made a search at the Lands and Deeds Registry which search showed that the property was free from encumbrances.

The applicant filed an Affidavit in opposition to the effect that on 12<sup>th</sup> November, 2010 he had taken the Consent Judgment to the Ministry of Lands. He exhibited a copy of the Consent Judgment stamped by the said Ministry. He further stated that the respondent was not the one who signed the Contract of Sale which the 1<sup>st</sup> claimant exhibited and that he could tell that the vendor's signature on it was not for Kabila because he was familiar with his signature.

Only counsel for the claimants filed written submissions before the Director of Court Operations. The others did not. He argued that the execution of the Consent Judgment via a Writ of possession was invalid at law and that the execution was incapable of disturbing the Assignment and Mortgage Deed. He further argued that the Consent Judgment was lodged in the Deeds Registry on 12<sup>th</sup> November, 2010 without leave of the Court as required by section 6 of the *Lands and Deeds Registry Act (2)*.

The Director of Court Operations noted in his Ruling that by 13<sup>th</sup> September, 2010 when the property was sold to the 2<sup>nd</sup> claimant, the Consent Judgment had not yet been registered. He said since the property was free of encumbrance, the Consent Judgment or any document relied on by the applicant did not in any way create an encumbrance divesting the respondent of the right to sale the house. He therefore decided that the 2<sup>nd</sup> claimant rightly purchased the property and the Title to it rightly passed to him. The issuance of the Writ of Possession was therefore futile, unjustified and unenforceable.

The grounds of appeal stated in the Notice of Appeal to a Judge in Chambers filed on 28<sup>th</sup> March, 2013 are as follows:

1. The learned Deputy Registrar erred in law and fact when he held that the Writ of possession was futile, unjustified and unenforceable.
2. The learned Deputy Registrar erred in law and fact when he held that the Consent Judgment cannot override the proprietary rights of Kabila and neither can it annul the sale lawfully executed between Kabila and Kamuchele.
3. The learned Deputy Registrar erred both in law and fact by setting aside the Writ of Possession when the Consent Judgment and leave to issue Writ of Possession was signed by the honourable Judge.

Although Advocates on both sides agreed to file written submissions as regards this appeal, only the applicant's advocate Mr. Fred Chalenga filed submissions on 23<sup>rd</sup> July, 2012. Mr. Chalenga argued the three grounds of appeal together that; When the Certificate of default was filed by the applicant on 5<sup>th</sup> August, 2010 and leave to issue a Writ of Possession was granted on 26<sup>th</sup> August, 2010, the deceased had no proprietary right to sale the house because his right had been transferred to the applicant. By the time state consent to assign was obtained, that is on 5<sup>th</sup> November, 2010 the applicant had already taken possession of the house.

He further submitted that the Director of Court Operations had impeached this Court's Judgment and Orders and yet he has no such jurisdiction. In support of this he relied on the case of **Zambia Seed Company Ltd v Chartered International (PTY) Ltd** (1) where the Supreme Court held that:

*“By law, the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.”*

He also relied on the case of **Sonny Mulenga, Vismar Mulenga, Chainama Hotels Ltd v Invest Trust Bank** (2) where the Supreme Court held that:

*“The successful party should not be denied immediate enjoyment of a judgment unless there are good and sufficient grounds.”*

He further argued that the deceased had illegally re-entered the house and quickly found a buyer to whom he purportedly sold the house, with a clear illegal intention to deny the applicant immediate enjoyment of the fruit of the Consent Judgment. He said State Consent to Assign was obtained long after the applicant had taken possession of the house. The learned Deputy Registrar failed or neglected to deal with the Exparte Order for leave to issue Writ of Possession signed by this Court on 26<sup>th</sup> August, 2010 and the legal effects of taking possession on 24<sup>th</sup> September, 2010. He also glossed over the issue of the legal capacity of the deceased Lucas Kamuchele to sell the house after it had been possessed by the applicant. By abdicating his responsibility, the Deputy Registrar denied the applicant justice. In this regard, he relied on the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd** (3) where the Supreme Court said:

***“A decision which, because of uncertainty or want of finality, leaves the doors open for further investigation over the same issues between the same parties can and should be avoided.”***

Mr. Chalenga argued that having granted leave to issue Writ of possession on 26<sup>th</sup> August, 2010 and possession having been taken on 24<sup>th</sup> September, 2010, the Court became *functus officio* and it was therefore not open to the Deputy Registrar to contradict the Judges Orders and grant possession to the 2<sup>nd</sup> claimant. He prayed that the appeal be upheld and the sale to the 2<sup>nd</sup> claimant be set aside. He also prayed for an order to enforce the Consent Judgment and costs.

Before I state my views on the appeal, I must mention that on 5<sup>th</sup> September 2011, I made an order to the effect that the order of stay of execution granted by the learned Deputy Director of Court Operations be extended until the determination of all the issues herein and cause No. 2011/HK/476 which was commenced by Scholastica Mulenga Kamuchele the surviving spouse of the late Lucas Kapaya Kamuchele who is the administrator of his estate, to set aside the Consent Judgment.

I have requested the Marshal Astridah Sakuwaha to bring the file for cause No. 2011/HK/476 to me but she said she has failed to locate it and it is not in the main case register. She said she contacted Nkana Chambers who signed the Writ on behalf of Mrs. Kamuchele to find out how far they have gone with the case but they failed to get back to her. I am therefore unaware of the name of the presiding Judge and how far it has gone. I have under the circumstances considered the whole record of proceedings and decided to set aside the stay of execution pending determination of cause No. 2011/HK/476 because it appears that, that case has been abandoned by Mrs. Kamuchele who has benefitted from the sale of the house. If at all the Consent Judgment has been set aside the parties are free to make appropriate applications to set the record straight. Proceedings before me were not at all stayed.



I have considered the interpleader which I am currently mandated to re-consider. Order 43 rule 1(b) of the High Court Rules Cap. 27 of the Laws of Zambia provides for interpleader as follows:

***“Relief by way of interpleader may be granted. (b) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the court, and claim is made to any money, goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process is issued.”***

Order 43(1) (b) is very clear. It does not provide for a situation where real property or immovable property has been seized in execution under a Writ of Possession like in this case. It applies to situations where money, goods or movable property (chattels) have been taken or are intended to be taken in execution. I am therefore of the view that interpleader in this case was improperly made under Order 43(1)(b) and should not have been entertained. Order 43 rules 2-9 provides for other aspects of interpleader.

Under the circumstances, the best course of action that the bank and Evaristo Kabila should have taken, was to start a fresh action against the estate of the deceased, because the Consent Judgment had been executed before the property was purportedly sold to Kabila by the respondent. In actual fact, the Consent Judgment was made much earlier than the purported Contract of Sale between the respondent and Kabila and it gave possession and the right to sell the property to the applicant. This means that the respondent had no legal right to sale the property after the Consent Order was signed and sealed by the Court.

I find that the respondent fraudulently sold the house to Kabila and the fraud made that contract of sale illegal and therefore unenforceable. I rely on the book Chitty on Contracts paragraph 16-017 which states *inter alia*: **“Where the object of a contract is the perpetration of a fraud.....the contract is illegal.”** I therefore find and hold that the motive of sale is a very important factor to consider. In this case the vendor’s intention was to defraud the applicant. Since the applicant and the respondent had agreed that if the respondent failed to pay monthly instalments as agreed, a Writ of Possession would be issued, there was nothing wrong with the Writ of Possession and it was enforceable. By law, the Consent judgment could only be challenged through a fresh action as submitted by Mr. Chalenga and not by **interpleader**.

It was improper for the claimants to challenge the execution of the Writ of Possession because they had no *lucus standi* to do so. As rightly pointed out by Mr. Chalenga, the learned Director of Court Operations did not at all guard against usurping this court’s authority when he made his decision.

Under the circumstances, and for reasons stated in this Ruling, the Ruling of the Deputy Director is hereby set aside. The Consent Judgment is now enforceable. The Contract of Sale between the respondent and the claimant is hereby declared illegal and void *ab initio* because it involved fraud. The claimants can make their claims against the estate of the deceased.

I further order that Evaristo Kabila or whoever is occupying the house should vacate the house within 14 days from the date hereof and hand it over to the Applicant Vlahakis Marcellas who should deal with it as the law permits. The applicant is hereby granted leave to re-issue the Writ of Possession should he not be given possession within the stipulated time. Applicant’s costs from the date of interpleader to date to be borne by the respondent and claimants equally. Leave to appeal is granted.

Delivered at Kitwe in Chambers this 28<sup>th</sup> day of January, 2014

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**C.K. Makungu**  
**JUDGE**